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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JERRY LEWIS, Defendant and Appellant.	B145469 (Los Angeles County Super. Ct. No. SA038237)

APPEAL from the judgment of the Superior Court of Los Angeles County. Kathleen Kennedy-Powell, Judge. Affirmed.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Robert F. Katz and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jerry Lewis, without authorization, used the number of a credit card account belonging to another person. Under the guise of a third-party billing request, appellant reserved two rooms in the Wynham Bel Age Hotel in West Hollywood, which were occupied on November 29 and 30, and December 1, 1999, and took possession of a rental car that he did not return. A jury convicted appellant of forgery (Pen. Code, § 484f, subd. (b))[1] and unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)). In a bifurcated proceeding, it found true allegations that appellant had suffered five prior robbery convictions (§§ 211, 667, subds (b)-(i), 1170.12, subds. (a)-(d)). The trial court denied appellant's motions for a new trial and dismissal of his prior felony convictions as strikes (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497). It imposed two concurrent sentences of 25 years to life in prison.

In this appeal, appellant asserts that prejudicial errors occurred which require reversal of the judgment. He assigns error to certain evidentiary rulings and the denial of his motions for a new trial and to strike, claims the evidence was insufficient to support the forgery conviction as a matter of law, faults the trial court for not instructing the jury sua sponte on the definition of "access card," asserts the bifurcated trial on the prior conviction allegations was fatally flawed, and argues that the sentence imposed is incorrect and unconstitutional. Alternatively, appellant requests remand to remedy various claimed omissions and errors. We affirm the judgment.

DISCUSSION

Pertinent facts and procedural history are included in the discussion of each of appellant's contentions.

Request to Review Probation Report of Prosecution Witness

On May 22, 2000, appellant filed a pre-trial motion for formal discovery regarding prosecution witness Yawna Thompson, for whom one of two hotel rooms was reserved and who was listed as an additional driver of the rental vehicle.

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[1] All further statutory references are to the Penal Code unless otherwise stated.

Appellant acknowledged he had been provided information regarding a felony conviction for Ms. Thompson but made a further request for her "misdemeanor history."

On July 7, 2000, appellant made an ex parte request for Ms. Thompson's probation report in an unrelated case to review Ms. Thompson's "mental history," to determine her aliases, to determine whether she had suffered additional convictions, and to determine whether there were any uncharged crimes of moral turpitude. Appellant indicated that the purpose of the request was to try to discover evidence that would impeach Ms. Thompson's credibility. The trial court refused the request, referencing Ms. Thompson's right to privacy and the obligation of the prosecution to provide appellant with her prior criminal history involving moral turpitude. Responding to appellant's doubt that the prosecution had provided all discoverable evidence, the trial court suggested appellant request the prosecution to do "a complete CII run of her record," which the trial court would review in camera for discoverable information to be given to the defense.

At a July 21, 2000 hearing, the prosecutor indicated that the parties were in agreement on what evidence would be admissible to impeach Ms. Thompson. The prosecutor stated for the record that Ms. Thompson had a felony conviction for bookmaking, for which she had been sentenced to 30 days of house arrest and was currently on probation, a misdemeanor conviction for bookmaking, and a misdemeanor conviction for domestic violence. The prosecutor also stated her understanding that appellant would not be using the misdemeanor convictions for impeachment purposes. Defense counsel agreed with the representation. At trial, Ms. Thompson admitted having suffered the felony conviction for bookmaking and serving the sentence imposed.

Appellant contends the trial court's denial of his request to review Ms. Thompson's probation report violated his Sixth Amendment and Fourteenth Amendment rights, as well as the requirement of section 1054.1, subdivision (e) that

the prosecuting attorney shall disclose to the defense "[a]ny exculpatory evidence." The contention is without merit.

While the trial court did deny appellant's request for unrestricted access to Ms. Thompson's probation report, it did not prevent him from obtaining information to which he was legally entitled. Appellant chose not to pursue the trial court's suggestion that he ask the prosecutor to assemble Ms. Thompson's entire criminal record for an in camera review, after which it would rule and release any legally discoverable information to appellant. In addition, defense counsel and the prosecutor engaged in off the record discussions that led to an agreement that the impeachment evidence would be limited to the felony conviction and sentence. The parties placed the agreement on the record at a pre-trial hearing. Thus, appellant waived any error. (*People v. Carpenter* (1997) 15 Cal.4th 312, 411.) Furthermore, there is no indication that appellant did not receive the impeachment evidence to which he was legally entitled.

Claimed Suppression of Exculpatory Eyewitness Evidence

Appellant reaches back to the preliminary hearing and notes that the magistrate expressed concern that an investigating officer, Detective David Oliva, had not included certain information in a two-page police report, explaining he had not thought it was relevant to the case. Appellant relates two examples. First, when Detective Oliva called one of the telephone numbers that hotel records indicated had been called from appellant's room, the detective reached a Shannon Wong. Ms. Wong told the detective she had no explanation why her number had been called from that location except that she had met a male Black at a music get-together. She had not known the identity of the caller. In the second example, Detective Oliva had interviewed "Don," the Bel Age concierge, and, in response to the detective's inquiries about the occupants of particular hotel rooms, Don had stated he did not know anything about them except that someone had called to request a rental car.

Appellant next references a proceeding at which defense counsel indicated she intended to question Detective Oliva about the above described omissions from his

report for the purpose of buttressing a "likely" defense theory of police misconduct. Defense counsel speculated that the detective had ignored all the exculpatory evidence and had brought only inculpatory evidence to the attention of the district attorney to assure a filing against appellant.

In response, the prosecutor represented that at the time of the preliminary hearing her office also had not had all of the information about the case, and that some information, indeed, had been omitted because it had not appeared to be pertinent at that time. The prosecutor further represented that since the preliminary hearing all information described by appellant and all information resulting from the further investigation of the case had been provided to the defense. She further stated that the prosecution case was based solely on the witnesses called at trial, not on Detective Oliva's testimony at the preliminary hearing, objecting that the information appellant sought to elicit would be more prejudicial than probative under Evidence Code section 352.[2]

The trial court sustained the objection, stating in part: ". . . I'm not going to allow the fact that he interviewed people that didn't identify [appellant]. [¶] Now, if he interviewed people that identified someone other than [appellant] as the perpetrator, that would be a different story, but a mere failure to identify, no. [¶] And the fact that you didn't know about it until the preliminary hearing, again, that's irrelevant to this jury. The evidence that's presented here and now either will convince them or not."

The record further discloses that appellant called Detective Oliva and Shannon Wong as defense witnesses. Detective Oliva testified he reached Shannon Wong through a telephone number listed on a "room portfolio," a prosecution exhibit admitted into evidence. Shannon Wong testified she had met "James" at a party, he

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[2] Evidence Code section 352 reads: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

had flirted with her, and they had exchanged telephone numbers. She described the person as of mixed race, about six feet two inches tall, with very light skin and straight hair. She believed that a telephone call she received sometime before Thanksgiving in November 1999 had been from "James," although she had not recognized the voice, because the caller told her he had met her at the party. Her telephone set, equipped with a caller identification function, indicated the source of the call as the Wynham Bel Age Hotel. She testified Detective Oliva had contacted her and shown her some photographs. She had not identified anyone in the photographs.

Don Leftwich, the hotel concierge, testified he handled a rental car request on November 29, 1999, from a male caller. Shortly after the call, he saw from an angle an African-American male approximately six feet tall, between 25 and 35 years old, in front of the hotel with the rental car representative. He never saw the man's face. The witness testified he did not recognize appellant at trial and he had not identified anyone in a photographic display the police had shown him during the investigation.

Appellant asserts that the refusal of the trial court on the grounds of relevancy and undue prejudice to allow him to question Detective Oliva regarding the omission from the police report of the information he obtained from Shannon Wong and from Don Leftwich, which he characterizes as exculpatory eyewitness evidence, was erroneous as a matter of law and violated his Sixth Amendment rights to present evidence and to cross-examine, and his Fourteenth Amendment right to due process of law, requiring reversal of the judgment. Appellant claims he was not the person who telephoned Shannon Wong and suggests that how the police initially handled this evidence as well as that indicating the concierge could not identify him was favorable material evidence. Appellant suggests that the omissions from the police report are evidence of the investigation's lack of thoroughness and good faith that resulted in appellant's conviction rather than that of Yawna Thompson. Appellant again asks for a remand for an evidentiary hearing should this court not agree with his argument.

We do disagree but conclude that remand is not required. First, as the trial court noted, the witnesses were not identifying someone other than appellant as the

perpetrator of the offenses but simply were unable to identify him as the perpetrator. In addition, the trial testimony of Don Leftwich included a physical description of the person meeting with the rental car representative that was accurate with respect to appellant's sex, race, and approximate height and age.[3] The evidence was not exculpatory. Furthermore, the inability of Wong and Leftwich to positively identify appellant was placed before the jury. Finally, the police investigation was not complete at the time of the preliminary hearing and there was nothing more than Detective Oliva's opinion at that time that the information he had elicited from Wong and Leftwich was not relevant to the case.

In summary, the subject identification evidence was not exculpatory, it was presented to the jury, and there was no showing that the police acted in bad faith and thus no violation of due process. (*California v. Trombetta* (1984) 467 U.S. 479, 488-489; *Arizona v. Youngblood* (1988) 488 U.S. 51, 58; *People v. Zapien* (1993) 4 Cal.4th 929, 964.) Given the nature of the identification evidence, the absence of evidence of bad faith, and the trial court's careful examination of the issues, there was no abuse of discretion in prohibiting questions relating to the omission from the police report on the grounds of irrelevancy and undue prejudice. (Evid. Code, § 352; *People v. Cain* (1995) 10 Cal.4th 1, 33.)

Sufficiency of the Evidence

The jury convicted appellant of one count of forgery pursuant to section 484f, subdivision (b), which provides: "A person other than the cardholder or a person authorized by him or her who, with the intent to defraud, signs the name of another or of a fictitious person to an access card, sales slip, sales draft, *or instrument for the payment of money which evidences an access card transaction*, is guilty of forgery." (Italics added.) Appellant contends that, as a matter of law, the evidence was

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[3] Appellant's probation report discloses that he is a male Black whose date of birth is July 13, 1970. A Department of Corrections fingerprint card in connection with a 1991 conviction lists his height at age 21 as five feet nine inches.

insufficient to convict him of this count because a vehicle rental agreement was signed and not "an access card, sales slip, sales draft, or instrument for the payment of money." Appellant's contention is without merit.

The phrase "or instrument for the payment of money which evidences an access card transaction" of section 484f, subdivision (b) is similar to the phrase "or other instrument in writing for the payment of money" of section 476, held to be an "omnibus catch-all phrase."[4] (*People v. Norwood* (1972) 26 Cal.App.3d 148, 156.) In discussing the general forgery section, section 470, it has been said: "Whether the forged instrument is one of a particular name or character or, if genuine, would create legal liability, is immaterial; the test is whether upon its face it will have the effect of defrauding one who acts upon it as genuine." (*People v. McKenna* (1938) 11 Cal.2d 327, 332; *People v. Vincent* (1993) 19 Cal.App.4th 696, 700-701 [signature card with fictitious signature was crucial document in scheme to defraud bank].) Section 4 exhorts us to construe the provisions of the Penal Code "according to the fair import of their terms, with a view to effect its objects and to promote justice."

In the instant case, appellant requested a rental vehicle under the guise of a third-party billing request. The rental agreement document included the credit card account number of the non-consenting third party. Appellant signed "J. Hill," a fictitious name, on the document and thereby effected delivery of the rental vehicle into his possession. The rental agreement document qualifies as an "instrument for the payment of money which evidences an access card transaction." Furthermore, with respect to the element of intent to defraud, the rental agreement document required

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[4] Section 476 reads in its entirety: "Every person who makes, passes, utters, or publishes, with intent to defraud any other person, or who, with the like intent, attempts to pass, utter, or publish, or who has in his or her possession, with like intent to utter, pass, or publish, any fictitious or altered bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money or property of any real or fictitious financial institution as defined in Section 186.9 is guilty of forgery."

return of the vehicle on December 3, 1999. Los Angeles Police Officer Michael Messenger observed appellant driving the vehicle on December 10, 1999, stopped appellant for a traffic violation, and learned that the vehicle had been reported stolen. The evidence supports the finding that appellant committed forgery within the meaning of section 484f, subdivision (b).

Motion for New Trial

Appellant moved unsuccessfully for a new trial on the ground that defense counsel had rendered ineffective assistance. The trial court denied the motion, stating: "I was obviously present at the trial and heard all the evidence, and I don't think that [appellant] received ineffective assistance of counsel. [¶] It's true that [defense counsel] did not call the eyewitness expert that had been appointed by the court, but I could only conclude that was a tactical decision on her part, and well within the [b]ounds of what a reasonable attorney would do in the situation presented there." Appellant assigns error to this ruling. The record does not support appellant's position.

On appeal, appellant makes two claims. He first argues that defense counsel failed to impeach Christina Tan, the representative of the rental car company who had positively identified appellant from a photographic display shortly after he committed the offenses in the instant case. Appellant notes discrepancies between Ms. Tan's testimony at the preliminary hearing and her testimony at trial. Second, appellant notes the failure of defense counsel to call the defense investigator to the stand regarding his interview of Ms. Tan.

Appellant concedes in his reply brief that defense counsel did elicit Christina Tan's inconsistent preliminary hearing testimony at trial. However, he argues defense counsel still rendered ineffective assistance because she failed to elicit a particular statement Ms. Tan made to the defense investigator that, appellant claims, was inconsistent with the witness's later testimony. The record discloses that appellant's motion for new trial did not include a declaration by the defense investigator. In the

absence of any evidence to support appellant's claim, the contention cannot be addressed further.

Instruction on Definition of "Access Card"

Appellant did not request an instruction defining "access card" and notes that the instructions given on the forgery count did not include a definition. Appellant contends that the trial court had a sua sponte duty to so instruct, asserting that "access card" has a technical meaning peculiar to the law, and citing the definition contained in section 484d, subdivision (2).[5] Appellant argues the omission requires reversal. Appellant's position is not persuasive.

"[T]erms are held to require clarification by the trial court when their statutory definition *differs* from the meaning that might be ascribed to the same terms in common parlance." (*People v. Estrada* (1995) 11 Cal.4th 568, 574-575, italics added.)

The trial court instructed as follows:

"Defendant is accused in Count Two of having violated Penal Code Section 484f(b), a crime.

"A person (other than the cardholder or a person authorized by the cardholder) who, with intent to defraud, signs the name of another or of a fictitious person to an access card, sales slip, sales draft, or instrument for the payment of money which evidences an access card transaction, is guilty of forgery.

"In order to prove this crime, each of the following elements must be proved:

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[5] Section 484d includes definitions for certain terms found in sections 484e to 484j, inclusive: "cardholder," "access card," "expired access card," "card issuer," "retailer," "incomplete" in reference to an access card, "revoked access card," "counterfeit access card," "traffic," and "card making equipment." Section 484d, subdivision (2) defines an access card as "any card, plate, code, account number, or other means of account access that can be used, alone or in conjunction with another access card, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by a paper instrument."

"1) A person signed the name of another or a fictitious person to any sales slip, sales draft, or instrument for the payment of money which evidences an access card transaction.

"2) That person had no authority to sign the name of the other person.

"3) That person knew he did not have the authority to sign the other's name.

"4) That person signed the instrument with the specific intent to defraud another person."

The testimony at trial was replete with references to the nonconsensual use of a third party's credit card account to effect the rental of two hotel rooms, attendant room service, and delivery of the rental vehicle. Given the context of the instruction, "access card" would have been understood by the jury as referring to the use of the third party's credit card account. There is no indication that the jury misunderstood the meaning of "access card" as used in the instruction. A sua sponte instruction was not required.

Bifurcated Proceeding -- Instruction on the Presumption of Innocence

Appellant contends that the trial court omitted instructing the jury on the presumption of innocence in the bifurcated proceeding determining the truth of the allegations regarding his prior convictions. A review of the record discloses that the trial court did so instruct the jury.

Bifurcated Proceeding -- Issue of Identity

Appellant contends that the trial court erred in denying his request that the jury determine identity in the bifurcated proceeding addressing the prior conviction allegations. Appellant is incorrect. The question of identity is to be resolved by the trial court. (*People v. Epps* (2001) 25 Cal.4th 19, 23-25.)

Claimed Sentencing Errors

Appellant assigns several errors to the sentencing procedure, claiming that section 654, prohibiting punishment under more than one provision, barred the concurrent sentences of 25 years to life; that the trial court did not properly exercise its discretion under section 1385; and that the resulting sentence is grossly

disproportionate and violates the prohibition against cruel and unusual punishment. There is no merit to appellant's position.

Appellant's concurrent sentences were appropriate under the three strikes law. (*People v. Lawrence* (2000) 24 Cal.4th 219, 222-223.) Appellant has waived his claim that his sentence is unconstitutionally disproportionate because he did not raise this issue in the trial court. (*People v. Kelley* (1997) 52 Cal.App.4th 568, 583.) Furthermore, there is no indication that he received ineffective assistance of counsel since appellant, having incurred five prior felony convictions for robbery, was properly sentenced under the three strikes law, and counsel is not required to do a useless act. (Cf. *People v. Ochoa* (1998) 19 Cal.4th 353, 463.)

DISPOSITION

The judgment is affirmed.

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_____, J.
DOI TODD

We concur:

_____, P.J.
BOREN

_____, J.
ASHMANN-GERST